In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 233

MONGOOSE GIN COMPANY and CLINTON MANGES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WPIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Small Business Administration loaned $250,000 to the Mongoose Gin Company, a Texas corporation. As security for that loan, the Gin Company gave S.B.A. its note, together with a deed of trust and chattel mortgages on certain of the company's property. In addition, the president of the Company, Clinton Manges, unconditionally guaranteed the repayment of the loan.

The company defaulted on the loan, and the property secured by the chattel mortgages and deed of trust was sold by S.B.A. at public auction. However, the proceeds of those sales were insufficient to cover the entire indebtedness. The present action was brought by the United States to recover a deficiency judgment against the company and against Clinton Manges as guarantor (R. 4).[1]

In the district court, petitioners admitted the amount of the loan, the validity of the note, the deed of trust and the chattel mortgages, and the default (R. 26-28, 45). They defended against the imposition of a deficiency judgment on the ground that the sale of the assets was unfairly conducted. In essence, they asserted in their answer that the selling trustee abused his discretion in selling the real property secured by the deed of trust separately from the gin machinery secured by the chattel mortgages, and that this and other actions by the trustee had confused prospective bidders and "chilled the bidding." The district court granted summary judgment to the government, ruling that the facts alleged in defendant's answer did not constitute a defense (R. 53-54).

On appeal, in addition to the matters presented to the trial court, petitioners urged a new ground for reversal. They pointed out that under Texas law the conduct of sales pursuant to chattel mortgages is purely a matter of contract. The chattel mortgages in suit provided three methods by which S.B.A., as

---

[1] "R" refers to the Record in the court of appeals, 40 copies of which were filed with the Court by petitioner.

mortgagee, could dispose of the secured property upon default: (1) at private sale, with or without notice to the mortgagor; (2) *"at public sale in the manner prescribed by law"* (R. 36, 42); or (3) by judicial proceedings. The S.B.A. sold the property covered by the chattel mortgages at a public auction sale conducted on the premises of the company. Petitioners contended that this method was unauthorized, since Texas has no law prescribing the manner in which public auction sales under chattel mortgages are to be conducted. Therefore, they argued, the clause of the chattel mortgage authorizing sale at public auction "in the manner prescribed by law" was meaningless. Petitioners concluded that the public sale of the gin machinery was consequently invalid and, since a valid sale was a prerequisite to a deficiency judgment, the judgment against them was erroneous.

The court of appeals affirmed the judgment of the district court, holding that the sales were not unfairly conducted. It stated (Pet. 22):

> [W]e have heretofore pointed out in the case of *Metals Development Company* v. *United States*, 5 Cir., 322 F.2d 210, a case arising out of the same foreclosure sales, the sales were conducted within the precise authority granted in the security instruments, and the appellants cannot complain that sales so conducted were in any way unfair to them or that sales thus conducted chilled or stifled the bidding.

The court did not pass on petitioners' argument that under the chattel mortgages the public sale was un-

authorized because not "prescribed" by Texas law, noting that this argument was not raised before the district court. Petitioners now urge that this Court grant certiorari on the ground that the court of appeals departed from the accepted course of judicial proceedings in refusing to consider all of their contentions.

Even assuming *arguendo* that petitioners have accurately stated the Texas law governing the validity of public sales under chattel mortgages,[2] a contract with the Small Business Administration, an arm of the United States Government, is governed by federal, not State, law.[3] Moreover, contrary to petitioners' assertions, "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel* v. *Helvering*, 312 U.S. 552, 556. The pleadings in the record reveal that the underlying substantive issues which

---

[2] But see, *Eichman* v. *Highland Park State Bank*, 345 S.W. 2d 352, 354 (Court of Civil Appeals of Texas, 1961): "The Courts of Texas, since the case of *Singer Sewing Machine Co. v. Rios*, 96 Tex. 174, 71 S.W. 275, 60 L.R.A. 143, have held that a provision in a chattel mortgage which authorizes and empowers the holder to take possession of mortgaged property, upon the mortgagor's default, and sell same at public or private sale is valid." The principal case relied upon by petitioners, *Campbell* v. *Eastern Seed & Grain Co.*, 109 S.W. 2d 997 (Court of Civil Appeals of Texas, 1937), is not to the contrary. It deals only with a private sale without notice, which was upheld as valid. Indeed, the chattel mortgage in *Campbell* was essentially indentical with regard to public sales as in the cases at bar. See 109 S.W. 2d at 998.

[3] *Clearfield Trust Company* v. *United States*, 318 U.S. 363; *United States* v. *Allegheny County*, 322 U.S. 174; *United States* v. *Standard Oil Co.*, 332 U.S. 301. Cf., *Small Business Administration* v. *McClellan*, 364 U.S. 446.

petitioners seek to bring to the Court's attention were not properly raised, litigated, or passed on below. There is thus no occasion for this Court's review. *McCullough* v. *Kammerer Corp.*, 323 U.S. 327. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

SHERMAN L. COHN,
RICHARD S. SALZMAN,
Attorneys.

AUGUST 1964

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 741872 148